

**Diamond Quasar Jewelry, Inc. v Courtney Love  
Cobain**

2011 NY Slip Op 32670(U)

October 11, 2011

Supreme Court, New York County

Docket Number: 115215/10

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 115215/2010  
DIAMOND QUASAR JEWELRY, INC.  
vs.  
COBAIN, COURTNEY LOVE  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

his motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1, 2, 3  
4, 5, 6  
7

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for summary judgment  
by plaintiff is granted in part in accordance  
with the attached memorandum decision.

**FILED**

OCT 12 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/11/11

[Signature]  
JUDGE DORIS LING-COHAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: LAS PART 36

-----X

DIAMOND QUASAR JEWELRY, INC.  
d/b/a JACOB & CO.,  
  
Plaintiff,

Index No.: 115215/10  
DECISION/ORDER

-against-

Motion Sequence No.: 001

COURTNEY LOVE COBAIN,  
  
Defendant.

-----X

HON. DORIS LING-COHAN, J.S.C.:

In this action to recover personal property or the value thereof, plaintiff requests partial summary judgment on the complaint (motion sequence number 001). For the following reasons, this motion is granted in part and denied in part.

**FILED**  
**OCT 12 2011**

BACKGROUND

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Diamond Quasar Jewelry, Inc. d/b/a Jacob & Co. (Jacob) is a licensed New York State corporation that engages in business as a jewelry merchant. *See* Notice of Motion, Exhibit C (complaint), ¶ 1. Defendant Courtney Love Cobain (Love), a New York State resident, is a celebrity musician and actress. *Id.*, ¶ 2.

On September 22, 2010, Love attended a charity benefit event called the “New Yorkers for Children Benefit” that was held at the Cipriani catering hall in New York County. *See* Love Affidavit in Opposition, ¶ 6. A day earlier, on September 21, 2010, Love had taken possession of four pieces of jewelry from Jacob: 1) two “ladies white gold diamond chains” (the chains); 2) one “white gold floral mesh cuff bracelet” (the bracelet); and 3) one pair of “white gold and diamond pave hoop earrings” (the earrings). Affidavit in Support of Notice of Motion, ¶7. Upon accepting possession of these pieces, Love signed a document entitled “memo” (the memo) that

recited that the value of the chains was \$34,200.00 each, the bracelet's value was \$70,000.00, and the earrings' value was \$45,300.00. *Id.*, ¶ 9. The memo further provides as follows:

The merchandise described below is delivered to the undersigned and consignee on memorandum at your risk from all hazards, regardless of loss or damage, upon the express condition that all such merchandise will remain the property of Jacob & Co. and shall be returned [i]n the original condition upon demand.

*Id.*, ¶ 9; Exhibit A.

Love states that, after the charity event, she placed both chains and the earrings in a bag and delivered them to the staff at the Mercer Hotel, where she was residing at the time, with instructions that they be returned to Jacob. *See* Love Affidavit in Opposition, ¶ 14. Love also states that she continued to wear the bracelet, but eventually delivered it, too, to the staff of the Mercer hotel with instructions to return it to Jacob. *Id.*, ¶ 15. Love alleges that the Mercer Hotel staff returned the bracelet to Jacob, but that they lost the bag containing the chains and earrings. *Id.*, ¶ 16. Love further states that, on November 8, 2010, she filed an incident report with the New York City Police Department regarding the lost jewelry, which has yet to be located. *Id.*, ¶ 18; Notice of Motion, exhibit B. Love finally claims that Jacob has refused to comply with her attorney's discovery demands in this action, with the result that she does not know whether Jacob has filed an insurance claim for the missing items. Affidavit in Opposition, ¶¶ 19-21; Pasternak Affirmation in Opposition, ¶¶ 6-12.

Jacob alleges that Love is liable to it for money damages in the amount of \$113,700.00 (i.e., the value of the missing jewelry pieces as stated in the memo). According to Jacob, it has made multiple demands for payment, and claims that Love has repeatedly refused to pay. *See* Notice of Motion, Arabov Affirmation, ¶¶ 13-22.

Jacob commenced this action by filing a summons and complaint that sets forth causes of

action for: 1) replevin; 2) breach of contract; 3) unjust enrichment; and 4) conversion. *See* Notice of Motion, Exhibit C. Love filed an answer that includes the affirmative defenses of: 1) failure to state a claim; 2) contributory negligence; 3) the doctrines of waiver, estoppel and/or laches; 4) that plaintiff's injuries were caused by third parties; 5) failure to mitigate damages; 6) a reservation that all matters not expressly admitted in the answer are deemed denied; and 7) a reservation of the right to assert additional affirmative defenses at the close of discovery. *Id.*; Exhibit D. Before the court is Jacob's motion that seeks summary judgment on its second cause of action for breach of contract and fourth cause of action for conversion, as well as for dismissal of Love's affirmative defenses.

#### DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1<sup>st</sup> Dept 2003).

As an initial matter, the parties argue over the timeliness of this motion. While it is true that a note of issue has yet to be filed in this action, CPLR §3212 (a) specifically provides that “[a]ny party may move for summary judgment in any action, after issue has been joined.” Thus, the lack of a note of issue is not a bar to Jacob's motion.

Love argues that the motion should be denied pursuant to CPLR §3212 (f), on the ground

that she has not yet had “a reasonable opportunity to obtain disclosure.” *See* Memorandum of Law in Opposition to Motion, at 9-10. The statute provides as follows:

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Jacob argues that the statute is no bar to the instant motion, because it is inapplicable. *See* Memorandum of Law in Further Support, at 8-9. Jacob specifically notes that Love’s discovery demands relate only to two issues: 1) the wholesale value of the jewelry; and 2) whether or not Jacob has submitted any insurance claims for the jewelry. *Id.* Jacob then states that the prices listed in the memo reflect the value of the jewelry, and that the affidavit of its president, Angela Arabov (Arabov) indicates unequivocally that no insurance claims have been submitted. *Id.*

As detailed below, the court agrees that CPLR §3212 (f) does not bar the instant motion, since Love’s defenses relate only to the issue of damages and not as to the issue of liability for plaintiff’s alleged claims.

As stated, Jacob’s second cause of action alleges breach of contract. Pursuant to New York law, the proponent of a breach of contract claim must demonstrate the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1<sup>st</sup> Dept 1988). Here, Jacob presents a copy of the memo, as well as an affidavit from its president, Angela Arabov (Arabov), and from Love, that demonstrate that Love did not return the chains and the earrings, and argues that Love has thereby breached the memo and is liable for the value of the lost jewelry. *See* Notice of Motion, Arabov Affidavit, ¶¶ 17-23. This is sufficient proof on Jacob’s breach of contract claim. Significantly, it is noted that Love does not dispute that the jewelry at issue was not returned to plaintiff as agreed.

Nevertheless, Love raises the following unpersuasive arguments in opposition.

Love argues that there are factual issues as to whether the memo at issue is a purchase contract or consignment contract, which preclude the granting of summary judgment on plaintiff's breach of contract claim. *See* Memorandum of Law in Opposition to Motion, at 5-8. However, whether the memo is considered to be a purchase contract or a consignment contract is irrelevant to whether Love is in breach of such contract, as established by plaintiff herein.

Nevertheless, upon review of the applicable law, the memo/contract at issue is in fact a consignment contract. In *Rahanian v Ahdout* (258 AD2d 156, 158-159 [1<sup>st</sup> Dept 1999]), the Appellate Division, First Department, provided the following analysis of "consignment" and "sale or return" agreements:

Both consignments and sale or return agreements usually involve a wholesaler... transferring possession of goods to a retailer ... who tries to resell the goods to the consumer. In a sale or return, there is a true sale in which title and risk of loss passes to the buyer-retailer and the buyer is entitled to retain all proceeds of a subsequent sale, liable to the seller only for payment of the purchase price. A sale or return involves delivery to the purchaser with an option in the purchaser to return the goods and revert title in the seller. However, in a consignment, the purchaser acts more like an agent, with an option to take title upon the occurrence of certain conditions. Title does not pass until that option is exercised. Title and right to immediate possession remain with the seller-wholesaler.

Unlike a sale or return, a consignment sale that is not a secured transaction is not governed by the UCC... . Rather, a true consignment sale is merely an "agency with a bailment" and basically governed by the law of agency and service contracts (internal citations and emphasis omitted).

Here, since title to the jewelry never passed to Love, it is clear that the memo was a consignment contract. Therefore, the court rejects Love's argument that there is a factual issue as to the type of contract at issue. Moreover, as indicated above, regardless of the type of contract

at issue, Love never disputes the fact that the contract was breached in that the jewelry was not returned to plaintiff. Further, Love fails to raise any other factual issues with respect to her liability on such claim. Thus, plaintiff is entitled to summary judgment on the issue of liability as to its breach of contract claim.

Love does, however, raise a factual issue as to the damages claimed. While plaintiff maintains that the plain language of the memo renders Love liable for \$113,700.00 - the stated value of the lost items of jewelry, this court disagrees.

In the recent decision in *A. Link Partners, Inc. v Senderowicz* (2010 WL 2066684, 2010 NY Misc Lexis 2209, 2010 NY Slip Op. 31215 [U] [Sup Ct, NY County 2010]) this court (Goodman, J.) confronted a similar factual scenario to this one and applied the governing law as follows:

“‘Bailment’ is defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract express or implied, that after the purpose has been fulfilled it will be redelivered to the person who delivered it, or otherwise dealt with according to that person’s directions, or kept until it is reclaimed.”

Usually, a bailee is liable for the fair and reasonable value of the lost property, which, if the item has a market value, is that value. The market value is not necessarily the retail price, but its replacement value [internal citations omitted].

Here, Jacob seeks to rely on the retail price of the lost jewelry that is recited in the memo. Based upon the case law, however, the reasonable value/market value is the correct measure of damages. See *Klar v. H & M Parcel Room*, 270 AD 538, 541 (1<sup>st</sup> Dept 1946); *Vetland v. FX Enterprises I, Ltd.*, 49 AD3d 632 (2<sup>nd</sup> Dept 2008). Notably, the terms of the memo, fail to indicate a measure of damages, upon the failure of defendant to return.

Further, since both parties correctly note that no discovery has been taken to date, and



there is no evidence before the court as to what the “market value” of the lost jewelry might be, summary judgment as to damages has not been established as a matter of law. Thus, plaintiff’s motion for summary judgment is granted as to liability on plaintiff’s breach of contract cause of action and denied as to damages with respect to such claim. The issue of damages shall be referred to a Special Referee to hear and determine in accordance with CPLR §4317(b), upon completion of discovery on such issue, and the filing of a note of issue.

Jacob’s fourth cause of action, which is also implicated in this motion, alleges conversion. The Court of Appeals has held that the “[t]wo key elements of conversion are (1) plaintiff’s possessory right or interest in the property and (2) defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights [internal citations omitted].” *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006). Love cites the holding of *A. Link Partners, Inc. v Senderowicz, supra*, that:

A conversion occurs when a person “intentionally and without authority assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession.” The two main elements of a conversion claim are the plaintiff’s interest or immediate superior possessory right in the property and the “defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights.” “A conversion implies a wrongful act, a mis-delivery, a wrongful disposition, or withholding of the property. A mere non-delivery will not constitute a conversion, nor will a refusal to deliver, on demand, if the goods have been lost through negligence, or have been stolen [internal citations omitted].”

Here, both parties admit that the jewelry at issue was either “lost through negligence or stolen.”

Therefore, Jacob’s conversion claim must fail, as a matter of law.

In its moving papers, Jacob states that “in the event the court grants plaintiff’s motion for summary judgment on either its second or fourth cause of action, plaintiff withdraws its first cause of action for replevin and its third cause of action for unjust enrichment.” *See* Notice of

Motion, Arabov Affirmation, ¶ 23. Here, the court has awarded Jacob partial summary judgment on its second cause of action for breach of contract. Therefore, the court deems that Jacob's first and third causes of action are withdrawn.

The next branch of Jacob's motion seeks the dismissal of Love's affirmative defenses. *See* Notice of Motion, Arabov Affidavit, ¶¶ 24-38. Love responds that "plaintiff's motion ... is only to dismiss the second and fourth causes of action, while Ms. Love's affirmative defenses also apply...to the first and third causes of action." *See* Memorandum of Law in Opposition to Motion, at 12. However, the court has already awarded Jacob partial summary judgment on the issue of liability on its second cause of action, has determined that the fourth cause of action is not viable, and that the first and third causes of action have been voluntarily withdrawn. Thus, such affirmative defenses are now irrelevant. With respect to Love's affirmative defense that Jacob failed to meet his obligation to mitigate its damages, Love has failed to identify the source of this alleged obligation, and no such duty is set forth in the language of the memo. Therefore, Love's affirmative defenses lack merit, and Jacob's motion to dismiss the affirmative defenses is granted.

#### DECISION

ACCORDINGLY, for the foregoing reasons, it is

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Diamond Quasar Jewelry, Inc. d/b/a Jacob & Co. is granted solely to the extent of awarding plaintiff partial summary judgment on the issue of liability on its second cause of action for breach of contract and awarding plaintiff summary judgment dismissing defendant Courtney Love Cobain's

affirmative defenses, but is otherwise denied; and it is further

ORDERED that the issue of the amount of money damages that are due as a result of plaintiff's breach of contract shall be referred to a Special Referee to hear and determine pursuant to CPLR §4317(b), upon the filing of a note of issue, after the completion of discovery on such issue; and it is further

ORDERED that all parties shall appear for a preliminary discovery conference on December 2, 2011, at which an expedited discovery schedule shall be ordered for the completion of discovery with respect to the only remaining issues herein, damages; it is further

ORDERED that documentary discovery demands to be served within 30 days, with responses to be supplied within 30 days of receipt; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry.

Dated: New York, New York  
October // , 2011

**FILED**

OCT 12 2011

NEW YORK  
COUNTY CLERK'S OFFICE

  
Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\diamondvlove.lane.wpd